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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ANTWOINE VAUGHN et al., Defendants and Appellants.	B277941 (Los Angeles County Super. Ct. No. TA138408)

APPEAL from judgments of the Superior Court of Los Angeles County. Eleanor J. Hunter, Judge. Affirmed in part, remanded in part, and sentence modifications.

Alex Coolman, under appointment by the Court of Appeal, for Defendant and Appellant Antwoine Vaughn.

Kelly C. Martin, under appointment by the Court of Appeal, for Defendant and Appellant Davaughn Love.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy

Attorney General, and David E. Madeo, Deputy Attorney General, for Plaintiff and Respondent.

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In 2016, defendants Davaughn Love (Love) and Antwoine Vaughn (Vaughn) appealed their convictions for attempted premediated murder, shooting at an occupied vehicle, and, as to Vaughn, also being a felon in possession. In a nonpublished opinion, we affirmed their convictions after rejecting challenges due to alleged errors in jury selection, in the jury instructions, with the admission of evidence, in the sufficiency of the evidence, and in the prosecutor's conduct of the trial. We nevertheless remanded their cases to fix one sentencing error with Vaughn's sentence and so the trial court could exercise its discretion whether to strike a previously mandatory firearm enhancement. Love petitioned the Supreme Court for review. While his petition was pending, our Legislature enacted Senate Bill No. 1437 (S.B. 1437), which "amend[s] the felony murder rule and the natural and probable consequences doctrine, as it relates to murder" (Stats. 2018, ch. 1015, § 1, subd. (f)). Our Supreme Court remanded the matter to us for further consideration in light of S.B. 1437. We solicited supplemental briefing on the issue. We conclude that the impact of S.B. 1437 on Love's convictions and sentence must be assessed by the trial court in the first instance. Accordingly, we issue this revised opinion addressing all of Love's and Vaughn's arguments (including Love's S.B. 1437-related arguments, in the newly added section VIII in the Discussion section), and adhering to our prior disposition.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

In August 2015, Love and Vaughn were members of the Blocc Crips, a subset of the Rolling 100's street gang. At that

time, the Rolling 100's gang was in the midst of a campaign to retaliate against the Hoover Criminals gang for killing a high-ranking Rolling 100's member. Consistent with this campaign, Love and Vaughn had filmed a video in which Vaughn, holding a rosary and a semiautomatic gun, pretended to fire into a fleeing crowd and then reloaded his gun while seated in a car. The video was subsequently uploaded onto YouTube.

On a Saturday in mid-August 2015, Vaughn enlisted Love to drive him into Hoover Criminals territory, and both defendants enlisted Timothy Boykins (Boykins), a former Rolling 30's member, to follow them in a separate car and videotape them. Defendants told Boykins they were going to "beat down" a rival gang member. However, when they got to rival gang territory, Love stopped the car, and Vaughn got out and approached a man standing on the sidewalk with a woman and two children. After exchanging a few words, Vaughn pulled out a gun and opened fire on the man's back. Vaughn continued "shooting wildly" as the man tried to flee into a nearby intersection. All in all, 10 bullets hit the man (causing injuries to his head, chest, leg, and hand), and three bullets struck a nearby car that was driving through the intersection. Vaughn got back into the car, and Love drove away. When Boykins later asked about the shooting, Vaughn told him it was "Blocc business."

Video cameras facing the intersection captured the shooting, but did not provide a clear image of the shooter's face. However, the shooting victim was shown a six-person photo spread and identified Vaughn as "the bitch that shot me." Love's and Vaughn's cell phones also put them at the location of the shooting at the time of the shooting. The next day, Love sent a

text message to Vaughn, reminding him that "we gotta move that gat," which is slang for "gun."

II. Procedural Background

The People charged both defendants with (1) attempted premeditated murder (Pen. Code, §§ 187, subd. (a), 664),[1] and (2) shooting at an occupied vehicle (§ 246).[2] The People also charged Vaughn with being a felon in possession of a firearm (§ 29800, subd. (a)(1)). The People alleged that all three crimes were "for the benefit of, at the direction of, or in association with" a criminal street gang. (§ 186.22, subd. (b)(4).) The People further alleged that the attempted premeditated murder involved personal use (as to Vaughn) and a principal's use (as to Love) of a firearm (§ 12022.53, subd. (d)). The People lastly alleged that Love had two prior "strike" convictions within the meaning of our Three Strikes law (§§ 667, subds. (b)-(j), 1170.12, subds. (a)-(d)); that Love had served one prior prison term (§ 667.5, subd. (b)); and that Vaughn had served two prior prison terms (*ibid.*).

The case proceeded to a joint trial using separate juries. Both juries were instructed on all charged offenses. Love's jury was also instructed that it could convict Love of the charged offenses either (1) as a direct aider and abettor of those offenses, and (2) as a natural and probable consequence of aiding and abetting Vaughn in the commission of an assault or a conspiracy to commit assault.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] The People also charged defendants with the attempted premeditated murder of the car's driver, but the People dismissed that charge prior to trial.

Vaughn's jury found him guilty of all offenses and found all enhancements to be true. So did Love's.

The trial court sentenced Vaughn to prison for 55 years to life plus 10 years. For the attempted premeditated murder count, the court imposed a life sentence with a minimum 15-year parole term plus 25 years for the firearm enhancement. For the shooting at an occupied vehicle count, the court imposed a consecutive life sentence with a minimum 15-year parole term. And for the felon-in-possession count, the court imposed a consecutive 10-year sentence, comprised of a three-year base term plus seven years for the gang enhancement.

The trial court sentenced Love to prison for 47 years to life. For the attempted premeditated murder count, the court imposed a life sentence with a minimum seven-year parole term plus 25 years for the firearm enhancement. For the shooting at an occupied vehicle count, the court imposed a consecutive life sentence with a minimum 15-year parole term. The court stayed the gang enhancement for the attempted premeditated murder count.

Each defendant filed a timely notice of appeal.

DISCUSSION

I. Jury Selection

Vaughn argues that the trial court erred in overruling his objection that the prosecutor's use of peremptory strikes to remove four African-American female jurors violated *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

Although a prosecutor may exercise a peremptory challenge to strike a prospective juror "'for any reason, or no reason at all' [citation]" (*People v. Scott* (2015) 61 Cal.4th 363, 387 (*Scott*)), he

or she may *not* use a peremptory challenge to "'strike prospective jurors on the basis of group bias—that is, bias against "members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds."'" (*People v. Bell* (2007) 40 Cal.4th 582, 596.) Doing so violates a defendant's federal right to equal protection set forth in *Batson*, *supra*, 476 U.S. at page 88 and his state right to a trial by a jury drawn from a representative cross-section of the community under article I, section 16, of the California Constitution set forth in *Wheeler*, *supra*, 22 Cal.3d at pages 276 to 277. (Accord, *People v. Gutierrez* (2017) 2 Cal.5th 1150, 1157 (*Gutierrez*).)

A defendant bears the ultimate burden of showing a constitutional violation (*People v. Lenix* (2008) 44 Cal.4th 602, 612-613 (*Lenix*), but courts employ a three-step, burden-shifting mechanism in assessing whether a *Batson*/*Wheeler* violation has occurred. The defendant must first "make out a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose in the exercise of peremptory challenges." (*Scott*, *supra*, 61 Cal.4th at p. 383.) If the trial court finds that the defendant has established this prima facie case, the prosecutor must then "explain adequately the basis for excusing the juror by offering permissible, nondiscriminatory justifications." (*Ibid.*) Lastly, the court must make a "'sincere and reasoned effort to evaluate the nondiscriminatory justifications'" (*People v. Williams* (2013) 56 Cal.4th 630, 650), and "decide whether" the prosecutor's proffered reasons are subjectively genuine or instead a pretext for discrimination. (*Scott*, at p. 383; *People v. Duff* (2014) 58 Cal.4th 527, 548; *People v. Jones* (2013) 57 Cal.4th 899, 917 (*Jones*).)

A. *Pertinent Facts*

1. *Initial round of questioning*

The trial court and counsel began voir dire by questioning 24 prospective jurors. Among those jurors were three African-American women—namely, prospective Juror Nos. 2, 8, and 19.

Juror No. 2 indicated that she had previously served on a jury in a criminal case that hung. In follow-up questioning, the prosecutor asked Juror No. 2 (and others) if she would believe a woman who was turning down a dinner invitation from a male coworker when the woman's proffered reason for declining was that she had to "wash [her] cat." The juror said it was "possible" the woman was telling the truth, and that her excuse about washing her cat was "reasonable" "if she's on Facebook, posting a bunch of cat pictures."

Juror No. 8 said she had "a negative experience" with law enforcement because, a few years earlier, a police officer had been "very aggressive" when he approached her parked car, including "pull[ing] his gun out." She also relayed that gang members had jumped her brother and shot her cousin.

Juror No. 19 stated that she also had a "negative experience" with law enforcement because, when she was 17 or 18 years old, she had been arrested for being present at a house party where drugs were found. The charges against her were ultimately dismissed. She reported that her brother was currently facing a gun charge in Los Angeles County. She further shared that she participated in an annual walk to commemorate her slain cousin, and that police provide security for the event.

2. *First round of strikes*

The prosecutor struck Juror No. 8 and two other jurors.

3. *Second round of questioning*

The court called 13 more prospective jurors for questioning. One of those jurors, Juror No. 28, was an African-American woman. During individual questioning, the juror said she would "factor in" the "consequences" of any guilty verdict she rendered, and would face a "moral dilemma" with herself in doing so.

4. *Second round of strikes*

The prosecutor exercised peremptory challenges against six jurors, including Juror Nos. 19, 28, and 2.

5. *Defense objection, response, and court ruling*

Vaughn objected on *Batson*/*Wheeler* grounds after the prosecutor struck Juror No. 2. The trial court found that "a prima facie case ha[d] been made" and asked the prosecutor to provide her reasons for striking the four African-American female jurors.

The prosecutor offered the following explanations:

As to Juror No. 8, the prosecutor pointed to (1) the juror's "bad experiences with law enforcement," (2) her conduct after she was excused as a juror, when she did not turn to face the court when responding to the court's question about a sport team's future prospects, and (3) the fact that she had "an issue with gangs."

As to Juror No. 19, the prosecutor pointed to (1) the juror's "negative experience with law enforcement," and (2) her brother's pending gun charge.

As to Juror No. 28, the prosecutor cited the juror's "moral issue with finding judgment of someone."

As to Juror No. 2, the prosecutor cited (1) the juror's participation on a criminal jury that hung, and (2) her act in "volunteer[ing] new information" in the hypothetical question

about the workplace date, which the prosecutor found problematic because she did not want jurors who would look beyond the facts presented.

The trial court overruled Vaughn's *Batson*/*Wheeler* objection, finding that the prosecutor had "expressed race-neutral bases for exclusion of each of the jurors" and that the "record" reflected those reasons.

B. *Analysis*

Vaughn challenges the trial court's finding that the prosecutor's reasons for dismissing three of the jurors—Juror Nos. 8, 19, and 2—was subjectively genuine and not a pretext for discrimination (the third step).

We conclude that the trial court did not err. Two of the jurors—Juror Nos. 8 and 19—indicated that they had negative experiences with law enforcement, and the third—Juror No. 2—was on a hung jury. These are valid, nondiscriminatory reasons to strike prospective jurors. (*Lenix*, *supra*, 44 Cal.4th at p. 628 ["We have repeatedly upheld peremptory challenges made on the basis of a prospective juror's negative experience with law enforcement"]; *People v. Manibusan* (2013) 58 Cal.4th 40, 78 ["the circumstance that a prospective juror has previously sat on a hung jury is a legitimate, race-neutral reason for exercising a strike"].)

Vaughn levels five further challenges to the trial court's ruling.

First, Vaughn asserts that the ruling is deficient because a trial court's third-step ruling must be "sincere *and reasoned*," which requires the court to spell out its reasoning except in cases where "neutral reasons for a challenge are sufficiently self-evident." (*Gutierrez*, *supra*, 2 Cal.5th at pp. 1171-1172.)

As explained above, the neutrality of the prosecutor's justifications for striking the three jurors at issue—based on their prior negative experiences with law enforcement and serving on a hung jury—is self-evident. (Accord, *People v. Reynoso* (2003) 31 Cal.4th 903, 919, 924 ["specific or detailed comments" "not required" for "every instance in which a prosecutor's race-neutral reason" is being accepted].)

Second, Vaughn contends that a juror's negative experience with one law enforcement official only means the juror has bad feelings about that specific official, not *all* law enforcement officials. This contention is at odds with the law noted above, which does not limit prior bad experiences to experiences with a specific officer and with other cases holding that even a *juror's relative's* bad experiences provide a race-neutral reason to strike that juror (see *Jones*, *supra*, 57 Cal.4th at p. 920).

Third, Vaughn asserts that the prosecutor's additional reasons for excusing Juror Nos. 8 and 2 are pretextual because (1) as to Juror No. 8, the prosecutor could not rely on the juror's conduct *after* the strike to justify the strike, and (2) as to Juror No. 2, the hypothetical question was confusing and effectively asked *every* juror to draw inferences. We need not examine these additional reasons because the prosecutor relied upon at least one acceptable, race-neutral reason to excuse these jurors and because nothing about the additional reasons calls into question the neutrality of the otherwise valid reason for excusal. (*People v. Turner* (1994) 8 Cal.4th 137, 172 [court may affirm denial of *Batson* challenge where trial court expressly or "implicitly found at least one race-neutral explanation for each questioned peremptory challenge"]; *People v. Pride* (1992) 3 Cal.4th 195, 230 [same]; cf. *People v. Arellano* (2016) 245 Cal.App.4th 1139, 1164-

1169 [single race-neutral explanation insufficient where "the entirety of the prosecutor's statements . . . raise serious questions about the credibility of" that explanation because it was offered only after the prosecutor disputed that the juror was African American and then offered a reason that "misstated the record"]; accord, *People v. Douglas* (2018) 22 Cal.App.5th 1162, 1176 [court must reverse where one of articulated motives is expressly prohibited].)

Fourth, Vaughn points out that some of the jurors said they could still be fair and impartial. Specifically, Juror No. 8 said she could still be fair, and Juror No. 19 said she also had good experiences with police (which presumably balanced out her bad experience). However, it does not matter whether these jurors could be fair because we are addressing peremptory challenges, not challenges for cause. (*People v. Mills* (2010) 48 Cal.4th 158, 176 ["A party's justification for exercising a peremptory challenge "'need not support a challenge for *cause*'"'].)

Lastly, Vaughn argues that the prosecutor's striking of Juror Nos. 8, 19, and 2 cannot withstand a comparative juror analysis. Under such an analysis, we "ask whether the prosecutor's justification for striking" a protected juror "applies just as well to an otherwise similarly situated" nonprotected "individual who is permitted to serve on the jury"; if so, this may indicate a discriminatory motive. (*Gutierrez*, *supra*, 2 Cal.5th at p. 1173.) Vaughn points to three examples. He asserts that Juror No. 11's answers regarding the cat-washing hypothetical were no different than Juror No. 2's. He is wrong: Juror No. 11 said it was reasonable to infer the woman's cat-washing story was untrue and, unlike Juror No. 2, Juror No. 11 did not invent new facts to support his answer. Vaughn next asserts that Juror

No. 8's and Juror No. 19's negative experiences with law enforcement were no different than responses from Juror Nos. 11, 21, 34, and 40. Again, he is wrong. Juror No. 11 said the police did not show up when he was a victim; Juror No. 21 said he was "pulled over randomly" by what appeared to be a gang unit; and Juror Nos. 34 and 40 said police had arrested family members. As these facts indicate, these other prospective jurors' experiences with law enforcement paled in both type and severity to the experiences of Juror No. 8 (who had been "very aggressive[ly]" approached by police with guns drawn) and Juror No. 19 (who had been arrested on a bogus charge that was later dismissed).

Lastly, Vaughn contends that Juror No. 8's anti-gang sentiment is no greater than the anti-gang sentiment felt by Juror Nos. 11 and 13 (who were personally jumped, or had family members jumped, by gang members); all three, in Vaughn's estimation, had "issues with gangs." But Juror Nos. 11 and 13 are not similarly situated to Juror No. 8 because they did not have negative law enforcement experiences; thus, we cannot infer racial animus from the prosecutor's decision to strike Juror No. 8 but not the other two jurors.

II. Instructional Errors

Defendants raise two instructional errors: (1) Both defendants contend that the trial court erred in not instructing the jury on the crime of negligent discharge of a firearm (§ 246.3) as a lesser included offense to the crime of shooting at an occupied vehicle; and (2) Love argues that the court erred in not instructing the jury that he could be liable for attempted premeditated murder as a natural and probable consequence of aiding and abetting an assault or conspiracy to assault only if a

reasonable person in Love's position would have reasonably foreseen an attempted *premeditated* murder was a consequence (as opposed to just an attempted murder). We review claims of instructional error de novo. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581, 584.)

A. *Lesser Included Offense of Negligent Discharge of a Firearm*

A trial court errs in refusing to instruct on a lesser included offense if "'there is "substantial evidence" from which a rational jury could conclude that the defendant committed the lesser offense, and that he is not guilty of the greater offense.'" (*People v. Whalen* (2013) 56 Cal.4th 1, 68, quoting *People v. DePriest* (2007) 42 Cal.4th 1, 50.) "[T]he 'substantial' evidence required . . . is not merely '*any* evidence . . . no matter how weak,' [citation], but rather '"evidence from which a jury composed of reasonable [persons] could . . . conclude[]"' that the lesser offense, but not the greater, was committed." (*People v. Cruz* (2008) 44 Cal.4th 636, 664.) We independently review the substantiality of evidence for these purposes, and do so by viewing it in the light most favorable to the defendant. (*People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1137; *People v. Posey* (2004) 32 Cal.4th 193, 218.)

The crime of negligent discharge of a firearm is a lesser included offense of the crime of shooting at an occupied vehicle. (*People v. Ramirez* (2009) 45 Cal.4th 980, 990 (*Ramirez*).) The crime of shooting at an occupied vehicle requires proof that the defendant (1) "maliciously and willfully discharge[d] a firearm," (2) "at an . . . occupied motor vehicle." (§ 246; *Ramirez*, at p. 985; *People v. Manzo* (2012) 53 Cal.4th 880, 884-885 (*Manzo*).) The crime of negligent discharge of a firearm requires proof that the defendant (1) "'unlawfully discharged a firearm,'" (2) "'did so

intentionally,'" and (3) "'did so in a grossly negligent manner which could result in the injury or death of a person.'" (*Ramirez*, at p. 986, quoting *People v. Alonzo* (1993) 13 Cal.App.4th 535, 538; § 246.3, subd. (a).)

Accordingly, whether a defendant is guilty of the greater offense of shooting an occupied vehicle or the lesser offense of negligent discharge of a firearm turns on whether he discharged the firearm *at* an occupied vehicle. (*Ramirez*, *supra*, 45 Cal.4th at p. 990.) For these purposes, a defendant discharges a firearm "at" an occupied vehicle if (1) the defendant shoots "directly at" an occupied vehicle (*People v. Overman* (2005) 126 Cal.App.4th 1344, 1355-1356 (*Overman*)), or (2) an occupied vehicle is "within the defendant's firing range" (*Ramirez*, at p. 990), at least if he shoots "in close proximity to" an occupied vehicle "under circumstances showing a conscious disregard for the probability that one or more bullets will strike the [vehicle] or persons in or around it" (*Overman*, at p. 1356; *Manzo*, *supra*, 53 Cal.4th at p. 888; *People v. White* (2014) 230 Cal.App.4th 305, 316).

In light of this law, a trial court is required to instruct on the lesser included offense of negligent discharge of a firearm only if there is substantial evidence from which a rational jury could conclude that the defendant did not fire his gun "in close proximity to" an occupied vehicle under circumstances showing a conscious disregard for the probability that one or more bullets would strike the vehicle. There was no such substantial evidence here. Vaughn shot "wildly" as he unloaded his weapon at his victim as the victim crossed an intersection designed for vehicular traffic in a densely populated urban area. Not surprisingly, three of the 13 bullets he fired hit a passing car. Under these circumstances, no rational jury could conclude that

Vaughn did not shoot in the direction of and "in close proximity to" occupied vehicles in a manner showing a "conscious disregard" for the probability he would hit a moving (and hence occupied) car.

Defendants essentially make two arguments. First and chiefly, they assert that Vaughn did not fire directly at any car (because he was shooting "wildly"). However, as explained above, the definition of "at" is not so narrow. Second, defendants argue that the bullets that hit the occupied car could have ricocheted off of some other surface and thence into the car. However, the mechanism by which the three bullets hit the occupied car—either directly or through a ricochet—has no effect on whether Vaughn was "shooting wildly" into an intersection and thus was firing "in close proximity to" occupied vehicles with conscious disregard for hitting them.

B. *Natural and Probable Consequences*

A person is liable for a crime if he commits the crime himself or if he aids and abets another in its commission. (§ 31.) A person is liable as an aider and abettor if (1) he knows of the actual perpetrator's unlawful purpose, (2) he, by his act or advice, aids, promotes, encourages, or instigates the actual perpetrator's commission of the crime, and (3) he acts with the intent or purpose to commit, encourage, or facilitate the actual perpetrator's commission of the crime. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1118; *People v. Prettyman* (1996) 14 Cal.4th 248, 259 (*Prettyman*); *People v. Beeman* (1984) 35 Cal.3d 547, 561.) When a person aids and abets a crime, he must have the same intent as the actual perpetrator. (*McCoy*, at p. 1118 & fn. 1; *People v. Nguyen* (2015) 61 Cal.4th 1015, 1054.)

An aider and abettor is guilty not only of the crime he intends to aid and abet, """but also of any other crime the perpetrator actually commits . . . that is a natural and probable consequence of the intended crime."""" (*People v. Rangel* (2016) 62 Cal.4th 1192, 1228-1229; *Prettyman*, *supra*, 14 Cal.4th at p. 261.) Before criminal liability will attach for a further crime beyond the intended crime, the People must prove (1) that the defendant aided and abetted the intended crime, and (2) the further crime "was a natural and probable consequence of the [intended] crime that the defendant aided and abetted." (*Prettyman*, at pp. 261-262.) In assessing the second element, courts ask: Would a reasonable person in the defendant's circumstances recognize that the further crime was a reasonably foreseeable consequence of the crime the defendant intended to aid and abet? (*People v. Chiu* (2014) 59 Cal.4th 155, 165 (*Chiu*); *People v. Medina* (2009) 46 Cal.4th 913, 920 (*Medina*); *People v. Gonzales* (2001) 87 Cal.App.4th 1, 9-10; *People v. Woods* (1992) 8 Cal.App.4th 1570, 1587.) For these purposes, it is enough if the further crime is a """possible consequence which might reasonably have been contemplated."""" (*Medina*, at p. 920). The further crime """need not have been a strong probability."""" (*Ibid.*) Under these standards, it does not matter "'whether the aider and abettor *actually* [subjectively] foresaw the [further] crime.'" (*Ibid.*; *Gonzales*, at p. 9.)

Love asserts that the trial court erred because it instructed the jury that the further crime that must be a reasonably foreseeable consequence of assault or conspiracy to assault was attempted murder, and not attempted *premeditated* murder. This assertion is without merit because our Supreme Court's decision in *People v. Favor* (2012) 54 Cal.4th 868 (*Favor*)

explicitly rejected it, holding instead that "attempted murder—not attempted premeditated murder—qualifies as the nontarget offense to which the jury must find foreseeability." (*Id.* at p. 879, italics omitted.) *Favor* went on to explain that the jury must nevertheless separately determine whether the attempted murder *itself* was willful, deliberate, and premeditated. (*Id.* at p. 880.)

Love contends that *Favor* was wrongly decided, and makes two arguments in support of that contention.

First, he argues that our Supreme Court's subsequent decision in *Chiu*, *supra*, 59 Cal.4th 155, effectively overruled (or, at a minimum, effectively undermined) *Favor*. We disagree. *Chiu* held that "legitimate public policy considerations" dictated that the greatest crime for which a defendant could be held liable on a natural and probable consequences theory was second degree murder, not first degree murder. (*Chiu*, at pp. 165-166.) *Chiu* did not speak to the public policy considerations underlying the crime of *attempted* murder. To the contrary, *Chiu* went out of its way to distinguish and preserve *Favor*. (*Chiu*, at p. 163.) We are bound by *Chiu*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455-456.)

Second, Love contends that the United States Supreme Court's decision in *Alleyne v. United States* (2013) 570 U.S. 99 (*Alleyne*) has overruled *Favor*. Specifically, Love asserts that *Chiu* distinguished (and upheld) *Favor* in part because the premeditation element of attempted murder was a "penalty provision" rather than an element of the crime (*Chiu*, *supra*, 59 Cal.4th at p. 163), and that *Alleyne*—as post-*Alleyne* decisions have recognized—undermines any distinction between penalty provisions and elements when it comes to what a jury must find

beyond a reasonable doubt. (*Alleyne*, at pp. 111-112 [facts that establish a mandatory minimum sentence, despite dealing with the penalty, must be found by a jury beyond a reasonable doubt]; *People v. Banks* (2014) 59 Cal.4th 1113, 1152 ["The willful, deliberate, and premeditated nature of an attempted murder is "'the functional equivalent of an element'" of the offense insofar as it increases the punishment for an attempted murder."].) Love's argument is valid as far as it goes, but it does not require us to vacate his attempted murder conviction. That is because the duty to present the question of whether an attempted murder was premeditated to a jury is a function of *Apprendi v. New Jersey* (2000) 530 U.S. 466, and has been recognized by our Supreme Court as far back as 2004—long before *Alleyne*. (See *People v. Seel* (2004) 34 Cal.4th 535, 548.) In accordance with this long-standing precedent, Vaughn's jury was required to find—and, by its guilty verdict, necessarily did find—that the attempted murder in this case was premeditated, willful, and deliberate.

At bottom, all of Love's arguments boil down to the question whether the crime that must be reasonably foreseeable to a reasonable person in Love's position is attempted murder or attempted premeditated murder. This alleged instructional error affects, at most, this single element of the natural and probable consequences doctrine. We need not definitively resolve the continued validity of *Favor* (in light of *Chiu* or *Alleyne*) because any instructional error in this case was harmless beyond a reasonable doubt. (*People v. Merritt* (2017) 2 Cal.5th 819.) Where, as here, we are dealing with a trial court's omission of an element, we must ask: Was the evidence going to that omitted element "overwhelming and uncontroverted"? (*Id.* at p. 832.)

Here, the answer to that question is "yes." The jury heard and rejected Love's argument that the crime of attempted murder was not a reasonably foreseeable consequence of the assault or conspiracy to assault a Hoover Criminal gang member. In light of this jury finding, the sole remaining question is whether the still-missing element—that is, that the reasonably foreseeable attempted murder would be *willful, deliberate, and premeditated*—was supported by "overwhelming and uncontroverted" evidence. It was. There is no evidence to suggest that the attempted murder the jury found to be reasonably foreseeable would be an unplanned, accidental, or spontaneous attempted murder. To the contrary, defendants drove into rival gang territory in the midst of a conflagration of gang warfare to carry out the very violence they enacted in a video posted online. On these facts, any error in the trial court's failure to require that the jury find the reasonably foreseeable attempted murder be *premeditated* was harmless beyond a reasonable doubt.[3]

III. Evidentiary Error

Vaughn argues that the trial court erred in rejecting his argument that the six-person photo spread presented to the shooting victim violated due process because it was impermissibly suggestive.

A. *Pertinent Facts*

A month after the shooting, police presented the shooting

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[3] In his supplemental brief on remand from the Supreme Court, Love argues that our harmlessness analysis is incorrect. Love had the opportunity to raise that argument in the petition for rehearing that he filed. His argument seeking what is, in effect, a second petition for rehearing is procedurally improper.

victim with a photo spread containing six photographs, including Vaughn's. All six photos depicted African-American men in their teens or 20's; all six men had their hair in braids; and all six men were wearing different clothing. The background color of the six photos varied: Three had a darker gray background; one had a light gray background; one had a light gray background with a mix of blue; and one had an all-blue background. Four of the men had closed mouths; one had a slightly open mouth; and one was smiling. Five of the photos were exactly the same size; one was cropped slightly smaller. The photograph of Vaughn was the one that was slightly smaller in size, with the all-blue background, and in which he was smiling.

B. *Analysis*

A defendant's right to due process is violated when a court admits evidence of a witness's identification of that defendant if (1) "'"the identification procedure was unduly suggestive and unnecessary"'" and, if so, (2) "'"the identification itself was [not otherwise] reliable under the totality of the circumstances."' [Citation.]" (*People v. Clark* (2016) 63 Cal.4th 522, 556.)

In assessing whether the identification procedure is unduly suggestive (the first step), courts ask whether the procedure "suggests . . . the identity of the person suspected by the police" "in advance of a witness's identification." (*People v. Brandon* (1995) 32 Cal.App.4th 1033, 1052; *People v. Ochoa* (1998) 19 Cal.4th 353, 413 ["the state must, at the threshold, improperly suggest something to the witness"].) A procedure is not unduly suggestive just because the "suspect's photograph is much more distinguishable from the others in the lineup" (*Brandon*, at p. 1052); to be unduly suggestive, the defendant's photograph "'must "stand out" from the others in a way that would suggest

the witness should select him.'" (*People v. Yeoman* (2003) 31 Cal.4th 93, 124 (*Yeoman*).)

In assessing whether a witness's identification is otherwise reliable (the second step), courts look to the "totality of the circumstances," including (1) "the opportunity of the witness to view the suspect at the time of the offense," (2) "the witness's degree of attention at the time of the offense," (3) "the accuracy of his or her prior description of the suspect," (4) "the level of certainty demonstrated at the time of the identification," and (5) "the lapse of time between the offense and the identification." (*People v. Cunningham* (2001) 25 Cal.4th 926, 989.) It is unclear whether we review suggestiveness claims de novo or deferentially (*People v. Johnson* (1992) 3 Cal.4th 1183, 1216-1217 (*Johnson*).) We will employ de novo review.

We conclude that the photo spread was not unduly suggestive, but acknowledge that it approaches that line. As Vaughn correctly observes, his photo has a different color background, is cropped in slightly smaller size, and is the only one with a suspect who is smiling. On these bases, it is certainly distinguishable from the others. However, our Supreme Court in *Johnson*, *supra*, 3 Cal.4th 1183, ruled that a six-person photo spread was not unduly suggestive due to "differences in background color and image size among the various photographs." (*Id.* at p. 1217; see also *People v. Hicks* (1971) 4 Cal.3d 757, 764 [different background; not unduly suggestive]; accord, *People v. Wimberly* (1992) 5 Cal.App.4th 773, 790 [difference in clothing of persons in lineup; not unduly suggestive].) The sole additional difference in this case is that Vaughn is smiling, but this would not seem to "'suggest the witness should select him'" (*Yeoman*, *supra*, 31 Cal.4th at p. 124).

The distinctions in this case fall far short of other cases where the photo spread was found to be unduly suggestive. (See *People v. Carlos* (2006) 138 Cal.App.4th 907, 912 [defendant's photograph was the only one with a name and identification number beneath it]; *Passman v. Blackburn* (5th Cir. 1981) 652 F.2d 559, 570 [defendant's photograph was the only one in color and with front view, whereas the other 11 were black and white mug shots with front and side views].)

However, even if we were to assume the photo spread was unduly suggestive, the shooting victim's identification of Vaughn was otherwise reliable. Even though the victim was first shown the photo spread a month after the shooting, the victim had ample opportunity to view Vaughn because they exchanged words before Vaughn opened fire, and the victim looked up at Vaughn and watched him as Vaughn continued to fire. The victim's description of the shooter's race, complexion, hairstyle, and build was accurate, and the victim was confident that Vaughn was "the bitch that shot him."

IV. Sufficiency of the Evidence

Love assails the sufficiency of the evidence underlying his conviction for shooting at an occupied vehicle, and particularly attacks the sufficiency of the evidence underlying the jury's finding that a reasonable person in Love's circumstances would recognize that shooting at an occupied vehicle was a reasonably foreseeable consequence of the assault or conspiracy to assault that Love intended to aid and abet. (*Chiu*, *supra*, 59 Cal.4th at p. 165.) In assessing the sufficiency of the evidence, we ""review the whole record in the light most favorable to the [verdict] to determine whether it discloses . . . evidence that is reasonable, credible, and of solid value . . . from which a

reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'"'" (*People v. Salazar* (2016) 63 Cal.4th 214, 242.)

The jury's shooting at an occupied vehicle verdict was amply supported. Substantial evidence supported the jury's finding that Love intended to, and did, aid and abet an assault or a conspiracy to assault: Love drove Vaughn and recruited Boykins to videotape the "beat down" they anticipated, and Love then drove Vaughn into rival gang territory with Boykins in tow. Substantial evidence also supported the jury's finding that a reasonable person in Love's position would have reasonably foreseen that a shooting at an occupied vehicle might result. It is well settled that a possible consequence of a fistfight between gang members is an attempted murder. (*Medina*, *supra*, 46 Cal.4th at p. 922; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1376; *People v. Godinez* (1992) 2 Cal.App.4th 492, 499-500.) A reasonable person in Love's position could reasonably foresee the possibility that Vaughn would "shoot wildly" at a rival gang member and, because the rival gang territory was in a densely populated urban area, shoot "in close proximity to" an occupied vehicle "under circumstances showing a conscious disregard for the probability that one or more bullets will strike the [vehicle] or persons in or around it." (*Overman*, *supra*, 126 Cal.App.4th at p. 1356; *Manzo*, *supra*, 53 Cal.4th at p. 885.)

V. Prosecutorial Misconduct

Love argues that the prosecutor committed three instances of misconduct during closing argument. Love did not object to two of the three instances, which would ordinarily bar him from objecting on appeal. (*People v. Crew* (2003) 31 Cal.4th 822, 839 [claim for prosecutorial misconduct forfeited unless defendant

objects and seeks jury admonition].) Love nevertheless asks us to reach the merits of those two claims on the ground that his trial counsel was constitutionally ineffective for not objecting; we will do so.

Conduct by a prosecutor may violate a defendant's right to due process under either the federal or state Constitutions. Conduct violates *federal* due process if it "'"'infects the trial with such unfairness as to make the conviction a denial of due process.' [Citation.]'" (*People v. Adams* (2014) 60 Cal.4th 541, 568.) Conduct violates *state* due process "'"'only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.' [Citation.]'" (*Ibid.*) These standards must be considered against the backdrop that "'[a] prosecutor is given wide latitude to vigorously argue his or her case and to make fair comment upon the evidence.'" (*People v. Dykes* (2009) 46 Cal.4th 731, 768.) In evaluating a prosecutor's comments, we evaluate them in context (*People v. Dennis* (1998) 17 Cal.4th 468, 522) and ask "whether there was a reasonable likelihood that the jury construed or applied any of the remarks in an objectionable fashion" (*People v. Booker* (2011) 51 Cal.4th 141, 184-185 (*Booker*)).

A. *Diluting the Presumption of Innocence*

In her rebuttal argument, the prosecutor argued that defendant "started out, and he had the right to a fair trial and the presumption of innocence. And as every witness came before you, and as every piece of evidence that was put into this book got presented, and all the different conclusions, reasonable conclusions, that were able to be made from the evidence you have been presented, that presumption of innocence went away, and, as he sits here today, he is no longer an innocent man."

Love objected, stating, "Until they go to the jury room and deliberate." The trial court stated, "That's true. Ladies and gentlemen, your decision is going to be made when you're back in the jury room." The prosecutor then continued, "As he sits here today, that presumption of innocence has been chipped away." When Love objected again, prosecutor then stated, "You have the evidence to take back there and to consider and to apply it to the law in this case."

A prosecutor commits misconduct when she misstates the law. (*People v. Marshall* (1996) 13 Cal.4th 799, 831.) As pertinent here, the law is that "[a] defendant in a criminal action is presumed to be innocent until the contrary is proved." (§ 1096; *Booker*, *supra*, 51 Cal.4th at p. 185.) Although it is the jury's role to determine through its deliberations whether the evidence presented by the People has rebutted the presumption of innocence (*Booker*, at p. 185; *People v. Goldberg* (1984) 161 Cal.App.3d 170, 189-190), a prosecutor does not misstate the law by arguing that the evidence presented at trial has rebutted the presumption. (*Booker*, at p. 183 [arguing that the presumption of innocence "should have left many days ago"]; *People v. Panah* (2005) 35 Cal.4th 395, 463 [arguing that the evidence "stripped away" the presumption of innocence] *Goldberg*, at p. 189 [arguing that "once the case has been proven to you . . . [t]here is no more presumption of innocence" because the defendant "has been proven guilty by the evidence"].) That is all that the prosecutor did here when she argued that the "evidence" at trial made the "presumption of innocence [go] away" and "chipped away" at it. This argument is accordingly distinguishable from the inappropriate arguments in *People v. Cowan* (2017) 8 Cal.App.5th 1152, 1159, where the prosecutor

argued that the "presumption is gone" once "the charges are read," and in *U.S. v. Perlaza* (9th Cir. 2006) 439 F.3d 1149, 1169, where the prosecutor argued that a "presumption of guilt" "take[s] over" once the jurors retire to the jury room to deliberate.

B. *Misstating the Burden of Proof*

In her rebuttal argument, the prosecutor explained, "Reasonable doubt is not beyond all possible doubt. We talked about that. What's reasonable, what's rational. That's what you have to decide. And you have to reject what's unreasonable."

This argument did not misstate the law. A prosecutor may not tell a jury that it can "find [a] defendant guilty based on a 'reasonable' account of the evidence" because doing so violates the mandate that a verdict rest upon a finding of guilt beyond a reasonable doubt. (*People v. Centeno* (2014) 60 Cal.4th 659, 673, italics omitted.) However, a prosecutor may urge the jury to "'decide what is reasonable to believe versus unreasonable to believe' and to 'accept the reasonable and reject the unreasonable'" because that urging does not dilute the prosecution's burden of proof. (*People v. Romero* (2008) 44 Cal.4th 386, 416.) The prosecutor's argument in this case falls into the latter category, and not the former: She implored the jury to "decide" "[w]hat's reasonable" and to "reject what's unreasonable"; at no point did she state that any reasonable account of the evidence satisfied the People's burden of proof beyond a reasonable doubt.

C. *Reliance on Sympathy*

The prosecutor began her initial closing argument, stating, "As the People have proved this case beyond a reasonable doubt to you, all that means is that I have proven to you that there is violence like this in our society and that you can be struck by it at

any time, unexpectedly, like the victims in our case." She went on to argue that the shooting victim and the driver of the car that was hit in this case will "never be the same for the violence that they have suffered and experienced; and none of us will be the same because we know that this kind of violence is out there."

As a general rule, "appeals to the sympathy or passions of the jury are inappropriate at the guilt phase of a criminal trial." (*People v. Fields* (1983) 35 Cal.3d 329, 362.) This is why it is misconduct for prosecutors to urge the jury to view a crime through the eyes of the victim. (E.g., *People v. Martinez* (2010) 47 Cal.4th 911, 957.) However, this line is not crossed simply by pointing out that the charged crime is part of a broader pattern of violence that harms society as a whole. (E.g., *People v. Rundle* (2008) 43 Cal.4th 76, 162.) And even if we assume the prosecutor crossed the line of permissible advocacy, her comments were brief and isolated in the context of a broader argument that focused on Love's culpability for the charged crimes. (*Ibid.*) The prosecutor's comments were also accompanied by jury instructions telling the jury not to "let bias, sympathy, prejudice, or public opinion influence [their] decision" and not to treat the attorneys' arguments as evidence. Once we factor in the presumption that jurors follow the instructions they are given (*People v. Boyette* (2002) 29 Cal.4th 381, 453), any reference to the broader impact of defendants' conduct did not rise to the level of a prejudicial violation of federal or state due process.

VI. Sentencing Issues

A. *Gang Sentence for Vaughn's Felon-in-Possession Count*

The trial court imposed a seven-year sentence for the gang enhancement when it sentenced Vaughn on the felon-in-possession of a firearm count. Where, as here, the underlying

crime is neither a violent nor serious felony (§§ 667.5, subd. (c) [felon-in-possession of firearm not a "violent felony"], 1192.7, subd. (c) [felon-in-possession of firearm not a "serious felony"]), the maximum sentence the trial court can impose for the gang enhancement is four years, not seven. (§ 186.22, subd. (b)(1)(A).) The seven-year sentence is therefore in excess of the maximum sentence authorized by statute. Accordingly, Vaughn's sentence for the felon-in-possession count must be modified to reduce the gang enhancement to four years.

B. *Remand for Senate Bill No. 620 Hearing*

Defendants have asked for a remand for the trial court to consider its newfound discretion, pursuant to Senate Bill No. 620, whether to strike the previously mandatory firearm enhancement of 25 years underlying their attempted premeditated murder convictions. (§ 12022.53, subd. (h), as amended by Stats. 2017, ch. 682, § 2.) Because this statutory amendment mitigates punishment by granting discretion to strike a previously un-strike-able enhancement (*In re Estrada* (1965) 63 Cal.2d 740, 748-750 (*Estrada*); *People v. Francis* (1969) 71 Cal.2d 66, 75-76), defendants whose convictions are not yet final—like the defendants in this case—are entitled to its benefit.

VII. Cumulative Error

Love argues that his convictions must be vacated because the cumulative effect of all of the errors he alleges so warrants. Because his individual claims lack merit, their cumulative impact does not warrant reversal. (*People v. McWhorter* (2009) 47 Cal.4th 318, 377.)

VIII. Relief Under S.B. 1437

S.B. 1437 retroactively amended the definition of "murder" to preclude a jury from "imput[ing]" "malice" "based solely on [a

defendant's] participation in a crime." (§ 188, subd. (a)(3).) Our Legislature's purpose was to "amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f).)

Love asks us to vacate his attempted premeditated murder conviction, which, as noted above, may have rested on the theory that attempted murder was a natural and probable consequence of the crimes of assault or conspiracy to commit assault he aided and abetted. More specifically, he argues that (1) S.B. 1437 reaches attempted murder as well as "murder," and (2) this court is empowered to vacate his convictions because S.B. 1437's ameliorative provisions are presumptively retroactive to nonfinal convictions under *In re Estrada* (1965) 63 Cal.2d 740. The People respond S.B. 1437 created its own procedural mechanism—that is, section 1170.95—through which defendants can present their requests for retroactive relief, such that the proper remedy is to remand the case to the trial court to allow defendant to file a section 1170.95 petition in the first instance. This is an issue of statutory interpretation we review de novo. (*People v. Superior Court (Sahlolbei)* (2017) 3 Cal.5th 230, 234.)

We conclude that the enactment of S.B. 1437 does not empower us to vacate Love's attempted premeditated murder convictions; instead, S.B. 1437 mandates a remand to the trial court to allow him to file a petition for relief under section 1170.95. Section 1170.95 authorizes defendants "convicted of . . . murder under a natural and probable consequences theory" to

"file a petition" to vacate their murder conviction based on S.B. 1437's change in law. (§ 1170.95, subd. (a)(3).) Where, as here, our Legislature has created a special statutory remedy for defendants to use in availing themselves of a retroactive change in the law, that procedure must be followed, and—notwithstanding *Estrada*—relief will not be granted on direct appeal of a conviction that is valid under the prior law. (*People v. DeHoyos* (2018) 4 Cal.5th 594, 603 (*DeHoyos*); *People v. Conley* (2016) 63 Cal.4th 646, 652 (*Conley*).) Our sister courts have uniformly applied this principle to S.B. 1437. (*People v. Martinez* (2019) 31 Cal.App.5th 719, 727-729 (*Martinez*); *People v. Anthony* (2019) 32 Cal.App.5th 1102, 1153-1157 (*Anthony*).)

Love resists this conclusion with three categories of arguments.

First, he argues that *Estrada* applies. He is wrong. In both *DeHoyos* and *Conley*, our Supreme Court explained that *Estrada*'s presumption of retroactivity (along with its empowerment of appellate courts to implement that retroactivity) is a gap filler meant applicable only when new legislation is "'silent on the question of retroactivity.'" (*DeHoyos*, *supra*, 4 Cal.5th at p. 602, quoting *Conley*, *supra*, 63 Cal.4th at p. 657.) By enacting section 1170.95 as part of S.B. 1437, our Legislature spoke.

Love goes on to offer several reasons why, in his view, S.B. 1437 is different from the statutes at issue in *DeHoyos* and *Conley*, and why *Martinez* and *Anthony* were wrong for not picking up on those differences. He argues that S.B.'s 1437's remedy—unlike the special statutory remedies at issue in *DeHoyos* and *Conley*—is not meant to be exclusive because (1) S.B. 1437's remedy says defendants "may" file a petition under

the statutory remedy (§ 1170.95, subd. (a)) (rather than that they "must do so"), and (2) S.B. 1437's remedy also provides that it "does not diminish or abrogate any rights or remedies otherwise available to the petitioner[-defendant]" (*id.*, subd. (f)). Neither of these grounds distinguishes *DeHoyos* or *Conley* because the remedies in those two cases had the same language. Defendant argues that S.B. 1437's remedy, unlike the special statutory remedies at issue in *DeHoyos* and *Conley*, does not disentitle a defendant to retroactive relief upon a finding by the trial court that the defendant poses an "unreasonable risk of danger to public safety." (§ 1170.18, subd. (b); 1170.126, subd. (f).) This is true, but irrelevant because S.B. 1437's special statutory remedy disentitles a defendant to retroactive relief upon a finding by the trial court that he personally "act[ed] with malice aforethought." (§ 188, subd. (a)(3).) All three statutes call for the development of further facts, a task to which trial courts are suited and appellate courts are not. Defendant argues that S.B. 1437—unlike the statutes at issue in *DeHoyos* and *Conley*—"concerns a change in the substantive law regarding homicide" rather than "a change in how certain crimes are classified." This is a false distinction, as the classification of a crime *is* part of the substantive law. Defendant argues that statements made in S.B. 1437's legislative history empower defendants to bypass section 1170.95. S.B. 1437's plain language is to the contrary and is controlling. (*Olson v. Automobile Club of Southern California* (2008) 42 Cal.4th 1142, 1151 ["courts must analyze a statute's plain language, and may look to the legislative history underlying a statute's enactment only if the plain language is ambiguous"].)

Second, Love urges that *People v. Gutierrez* (2014) 58 Cal.4th 1354 requires us to conclude that *Estrada* trumps section

1170.95. *Gutierrez* does not. The pertinent question in *Gutierrez* was whether courts should treat a sentence of life without the possibility of parole imposed on a juvenile as being *something less* (for purposes of evaluating the constitutionality of that sentence under the Eighth Amendment) because our Legislature had recently enacted a provision (§ 1170, subd. (d)(2)) that granted trial courts a mechanism for those juveniles to seek resentencing 15 to 24 years after sentence was imposed. (*Gutierrez*, at pp. 1386-1388.) *Gutierrez* thus did not confront the question presented by *DeHoyos*, *Conley* and this case—namely, whether a legislatively enacted ameliorative change in the law applies retroactively on appeal under *Estrada* if the law also creates a separate procedural mechanism to implement that change in the law. Indeed, *Gutierrez* does not cite *Estrada* at all. *Gutierrez* is therefore of no consequence. (*People v. McKinnon* (2011) 52 Cal.4th 610, 639 ["decisions . . . are not authority for issues neither considered nor decided therein."].)

Third, Love contends that section 1170.95's procedure is unconstitutional because it empowers a trial court to make factual findings regarding his eligibility for relief under S.B. 1437 in derogation of his Sixth Amendment right to jury findings on all facts affecting his sentence under *Apprendi v. New Jersey* (2000) 530 U.S. 466. We reject this contention for two reasons. To begin, our Supreme Court in *People v. Perez* (2018) 4 Cal.5th 1055, 1063-1064, ruled that retroactively ameliorative statutes like S.B. 1437 do not implicate a defendant's Sixth Amendment rights. Love's attempts to distinguish *Perez* on the ground that S.B. 1437 redefines the elements of "murder" is unpersuasive. Further, Love's argument leads to an absurd result. If a trial court cannot make additional factual findings without violating

Apprendi, neither could we; Love's interpretation would mean that legislatures could not, when passing retroactive ameliorative legislation, prescribe *any* case-specific limits that would require additional factual findings. This is absurd.

Accordingly, we affirm Love's attempted murder conviction on appeal, but do so without prejudice to his filing a section 1170.95 petition in the trial court. The trial court can, in the first instance, decide whether S.B. 1437 applies to an attempted murder conviction and whether Love otherwise qualifies for relief. Nothing in our discussion is intended to suggest any opinion on the merits of such a petition.

DISPOSITION

The case is remanded for resentencing to allow the superior court to consider whether the enhancements under section 12022.53 should be stricken pursuant to section 1385.

Vaughn's judgment is modified as follows:

The portion of the judgment imposing a seven-year gang enhancement for possession of a firearm by a felon is modified to a four-year term, and the trial court is ordered to prepare and forward to California's Department of Corrections and Rehabilitation an abstract of judgment modified accordingly.

In all other respects, the judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
CHAVEZ